TAMILESWAARAN RAVI KUMAR v. ELECTION COMMISSION OF MALAYSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-395-06-2022]
24 APRIL 2023

Abstract – *Article 119(1) of the Federal Constitution ('FC') provides that an elector, who fulfils the requirements of age, residency and is registered as an elector in the electoral roll of the constituency in which he resides, is entitled to vote in any election unless he is disqualified under art. 119(3) or under any law relating to offences committed in connection with the elections. However, the Election Commission is subject to Federal law when conducting elections under art. 113(1) of the FC. The phrase 'subject to the provisions of federal law' in art. 113(1) of the FC shows there would be, in a Federal law somewhere, a limitation upon the authority to conduct elections.*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application for – Challenge against decision and/or action of Election Commission ('EC') – Elector tested positive for COVID-19 and ordered to undergo home quarantine or isolation – Elector turned up during polling day but denied entry into polling centre – Elector alleged that he was denied constitutional right to vote – Whether decision and/or action of EC tainted with illegality – Whether EC could prevent elector from voting – Whether standard operating procedures put into place prevented elector from voting – Federal Constitution, arts. 113 & 119*

The applicant was a registered elector for the Skudai constituency that was represented in the Johor State Legislative Assembly. The State of Johor held its election for the State Legislative Assembly and the elections took place at the time when the country was still grappling with the COVID-19 pandemic. Days before the polling day, the applicant tested positive for COVID-19 and he was ordered to undergo home quarantine or isolation. On the polling day, while on his sixth day of isolation, the applicant claimed to have self-tested himself at home and found the result showing negative for COVID-19. His MySejahtera status, however, showed that he was still COVID-19 positive and was 'high risk'. Armed with the self-test result, the applicant attended his polling centre but was turned away by virtue of the Prosedur Operasi Standard (SOP) Pencegahan COVID-19 Bagi Pelaksanaan Pilihan Raya Umum (PRU) Dewan Negeri Johor Ke-15 ('SOP'). As a result, the applicant contended that he was unable to exercise his right to vote for the candidate of his choice for the said election. The applicant applied for leave to commence judicial review proceedings, for an order of *certiorari*, to quash the decision and/or action of denying him entry into the polling centre

to cast his vote and for declarations to the effect that he was denied his constitutional right to vote. In support of his application, the applicant submitted that, *inter alia*, the decision and/or action was tainted with illegality as the applicant had a right to vote under art. 119 of the Federal Constitution ('FC'), Elections Act 1958 and Elections (Conduct of Elections) Regulations 1981 ('election laws') and, since the applicant fulfilled the requirement under the election laws, the Election Commission ('EC') could not prevent him from voting. Alternatively, the applicant submitted that even if the EC was correct in relying on the SOP, the SOP itself did not prevent the applicant from voting.

Held (dismissing application):

(1) Under art. 119(1) of the FC, an elector, who fulfils the requirements of age, residency and registered as an elector in the electoral roll of the constituency in which he resides, is entitled to vote in any election unless he is disqualified under art. 119(3) or under any law relating to offences committed in connection with elections. It could not be overlooked that the EC is also subject to Federal law when conducting elections by virtue of art. 113(1). The words 'subject to the provisions of Federal law' in art. 113(1) of the FC are words indicating restriction. The words warned that there would be, in a Federal law somewhere, a limitation upon the authority to conduct elections. The words 'Federal law' in art. 160(2) of the FC, *inter alia*, mean an Act of Parliament. Therefore, there could be an Act of Parliament which would impose restrictions or limitations on the EC in their functions of conducting elections. The words 'Federal law' would also include laws other than laws relating to election. One such Federal law is the Prevention and Control of Infectious Diseases Act 1988 ('PACIDA') which has a provision that confers power to the Minister to make regulations to curb the outbreak of infectious diseases among humans that is threatening public health. The election was subjected to the restrictions and limitations imposed under such Federal law. Therefore, the EC had not acted illegally and/or irrationally by complying with and giving effect to the SOP for the elections by restricting admittance into the polling centre electors positive for COVID-19. The EC was bound by art. 113(1) of the FC to give effect to such Federal law when carrying out its function of conducting elections. (paras 25, 31-33 & 40)

(2) There was no illegality or irrationality for the EC to comply with the said SOP. The EC did not commit an error of law or misconstrue the SOP for the elections. The EC was, under art. 113(1) of the FC, subjected to any Federal law which concerned public health in carrying out its functions of conducting elections. The SOP, which was made under the PACIDA, had a legislative effect and was lawfully followed by the EC. (para 45)

Case(s) referred to:

Abdul Fatah Hj Haron, Saman Gulam v. Tan Sri Hj Mohd Sunoh Marso & Ors [1987] 2 MLJ 718 ***(refd)***

Alam Venture Sdn Bhd & Anor v. Abdul Aziz Abdul Majid & Ors [2015] 5 CLJ 1 FC ***(refd)***

Anukul Chandra Pradhan v. Union Of India AIR [1997] SC 2814 ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(dist)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Yazid Sufaat v. Suruhanjaya Pilihanraya Malaysia [2010] 3 CLJ 903 ***(refd)***

Zi Publications Sdn Bhd v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener) [2015] 8 CLJ 621 ***(refd)***

Legislation referred to:

Federal Constitution, arts. 5(1), 8(1), 113(1), 119(1), 160(2)

Prevention and Control of Infectious Diseases (Measures Within Infected Local Areas) (National Recovery Plan) Regulations 2021, regs. 5(1), 16

For the applicant - New Si Yew & Nur Izni Syazwani; M/s Amer-BON

For the respondents - Mohammad Al-Saifi Hj Hashim, Raja Shahril Anuar Raja Baniamin & Nor Aqilah Abdul Halim; SFCs

Reported by Najib Tamby

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] On 7 December 2022, I dismissed the applicant, Tamileswaaran a/l Ravi Kumar's application for the following reliefs:

(i) an order of *certiorari* to quash the decision or action of preventing and/or denying the applicant of his right to vote on 12 March 2022;

(ii) a declaration that the first respondent, the Election Commission of Malaysia ("the Election Commission") had wrongfully prevented or denied the applicant of his right to vote on 12 March 2022 on the ground that the applicant was in a quarantine period;

(iii) a declaration that the Election Commission was wrong under the law in preventing or denying the applicant of his right to vote on the ground that the applicant had contracted an infectious disease;

(iv) a declaration that the Election Commission had violated the applicant's constitutional right under art. 119 of the Federal Constitution; and

(v) damages for the violation of the applicant's constitutional right.

[2] This judgment contains the full reasons for my decision.

Background Facts

[3] The applicant is a registered elector for the Skudai constituency that is represented in the Johor State Legislative Assembly. The state of Johore held its elections for the State Legislative Assembly and the polling day was scheduled on 12 March 2022 ("polling day"). The applicant's polling station was at the polling centre known as Sekolah Kebangsaan Taman Tun Aminah 2 ("the polling centre"). The elections took place at the time when the country was still grappling with the Covid-19 pandemic. Standard operating procedures had been put in place by the Director-General of Health which provided detailed procedures and protocols to be followed for the Johore State Elections as a measure to curb and manage the spread of Covid-19.

[4] On 7 March 2022, the applicant was tested and found to be positive for Covid-19 positive. He was ordered to undergo home quarantine or isolation under the Standard Operating Procedure ("SOP") of Phase 4 of the National Recovery Plan. Isolation was mandatory under this SOP for persons found to have been infected with the Covid-19 virus. On 12 March 2022, while in his sixth day of isolation the applicant claimed to have self-tested himself at his home and found the result showing negative for Covid-19.

[5] Armed with the self-test result, the applicant attended his polling centre against the mandatory requirement of the said SOP and when his MySejahtera status showed that he was positive for Covid-19. MySejahtera is an application developed by the Government of Malaysia to assist in curbing and managing the Covid-19 outbreak in the country. It has many features including the current Covid-19 status of a person. The applicant was turned away from the polling centre by virtue of the Prosedur Operasi Standard (SOP) Pencegahan Covid-19 Bagi Pelaksanaan Pilihan Raya Umum (PRU) Dewan Negeri Johor Ke-15 ("SOP for the Johore State Elections") according to the election officers on duty at the polling station. It was said that persons positive for Covid-19 were not allowed in the polling centre.

[6] It is not in dispute that the applicant's MySejahtera status showed that he was "high risk" due to being positive for Covid-19. Only persons who were negative for Covid-19 and without any symptoms in relation to Covid-19 were allowed into the polling centre and to their respective polling stations to vote. The other categories of persons allowed into the polling centre but to a specially constructed tent in the polling centre to vote are: (i) persons negative for Covid-19 on their MySejahtera but showing symptoms for Covid-19; and (ii) persons known as "patients under investigation ("PUI")" or "persons under surveillance" ("PUS") who have a written permission from the District Health Officer.

[7] The applicant claimed to have tried to contact the Johor Bahru District Health Department *via* telephone in order to obtain written permission but was not able to reach anyone. This was due to the fact that the District Health Department was closed for the weekend. It is obvious that what the applicant was attempting to do as advised by health officer manning the specially constructed tent would have been an exercise in futility since the applicant status is positive for Covid-19 and he is someone who is not a PUS or a PUI. This would be against the clear protocol in the SOP for the Johore State Elections which states that a person positive for Covid-19 cannot be allowed into the polling centre. As a result, the applicant was unable to exercise his right to vote for the candidate of his choice for the said elections.

[8] On 8 June 2022, the applicant applied for leave to commence judicial review proceedings for an order of *certiorari* to quash the decision and/or action denying him entry into the polling centre to cast his vote and for declarations to the effect that he was denied his constitutional right to vote.

Grounds For Review

[9] The applicant advanced two established grounds of review to support the reliefs he was seeking. The first was that the decision or action refusing him entry into the polling centre and to cast his vote was tainted with illegality for the following reasons:

(i) the applicant has a right to vote under art. 119 of the Federal Constitution, Elections Act 1958 and Elections (Conduct of Elections) Regulations 1981 ("election laws") and since the applicant has fulfilled the requirements under the election laws the Election Commission cannot prevent him from voting;

(ii) the elections laws do not empower the Election Commission to deny the applicant admission into the polling centre and prevent him from exercising his constitutional right to vote on the grounds that he had contracted an infectious disease (which is denied) and was still in his quarantine period;

(iii) the election laws do not provide any requirement for voters within their quarantine period to obtain prior permission from the District Health Officer before they can exercise their rights to vote. The Election Commission had imposed a condition on the applicant's right to vote which is not provided for by election laws;

(iv) the Election Commission acted beyond the powers under the election laws by preventing the applicant from voting;

(v) the Election Commission had wrongfully delegated its powers to the District Health Officer in the matter of whether the applicant is allowed to vote; and

(vi) the Election Commission failed to exercise its duties and/or discretion correctly under the election laws to allow the applicant to vote.

[10] The second ground advanced was that the decision or action of the Election Commission refusing him entry to cast his vote was an irrational or unreasonable act for the following reasons:

(i) the applicant was prevented from voting notwithstanding the applicant's Covid-19 self-test result was negative;

(ii) although the Election Commission had prepared health officers with PPE and designated polling tent for voters with Covid-19 symptoms, PUI and PUS, the applicant was prevented from voting because he was still under quarantine and had not obtain the written permission from the District Health Officer;

(iii) the Election Commission was inconsistent in its decision and/or action as it had allowed persons who were Covid-19 positive and/or within the quarantine period to vote at other polling centres on the same day;

(iv) the Election Commission failed to take into account the applicant's legitimate expectation as a citizen to vote; and

(v) the Election Commission's decision and/or action was so perverse and unjustifiable that no reasonable tribunal would have done the same.

Relevant Principles Of Judicial Review

[11] The applicant in his written submissions submitted that his case is centred on the grounds of illegality and/or irrationality of the Election Commission's decision and/or action in preventing the applicant from voting. It suffices to state that both grounds permit the court to review the decision or action complained not only for process but also substance (see *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145). However, post *R Rama Chandran* cases have clarified the application of the principle therein where it is said that for reasons of public policy, national interest, public safety or national security, it may be wholly inappropriate for the courts to attempt any substitution of views (see *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; and *Alam Venture Sdn Bhd & Anor v. Abdul Aziz Abdul Majid & Ors* [2015] 5 CLJ 1).

[12] In *Kumpulan Perangsang Selangor Bhd*, Gopal Sri Ram JCA (as he then was) delivering the judgment of the Supreme Court lucidly stated the principle in the following words:

A ... there may be cases in which, for reasons of public policy, national interest, public safety or national security, it may be wholly inappropriate for the courts to attempt any substitution of views. Unlike the Executive, the Judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision
B involving these considerations. Each case must be considered on its own facts and it would be quite unwise to attempt the formulation of an all-embracing rule. (emphasis added)

Election Commission's Case

C **[13]** On behalf of the Election Commission, its election officer in charge of the polling centre, Abdul Hamid bin Ismail confirmed in an affidavit in reply affirmed on 28 July 2022 that the applicant had come to the specially constructed tent in the afternoon of polling day. The MySejahtera status of the applicant showed "high risk" or positive for Covid-19. The applicant had asked that he be allowed to vote since his self-test showed a negative result.

D **[14]** Abdul Hamid bin Ismail averred that the health officer on duty at the tent, Corneilia Mila Anak Billie informed the applicant to obtain a letter from the District Health Officer allowing a PUI or a PUS person to be allowed into the polling centre if he still intended to vote. Corneilia Mila
E Anak Billie, in an affidavit in reply, affirmed on 28 July 2022 averred the same facts.

[15] One Dr Mohd Anwar bin Shahrir who was the officer from the District Health Department and in charge of such specially constructed tents in ten polling centres for the said elections said as follows in his affidavit in
F reply affirmed on 28 July 2022:

Saya sesungguhnya menafikan perenggan 16 Afidavit Sokongan Pemohon dan sesungguhnya menyatakan bahawa tiada arahan baru yang dikeluarkan oleh Suruhanjaya Pilihan Raya (SPR) pada hari pilihan raya iaitu 12.3.2022. Pemohon sememangnya tidak dibenarkan untuk
G mengundi kerana SOP yang dirujuk di Ekshibit MAS-1 di muka surat 19 telah dengan jelas menyatakan bahawa Pengundi berstatus Covid-19 Positif adalah TIDAK DIBENARKAN keluar dari tempat mereka sedang menerima rawatan (hospital/pusat kuarantin/rumah dll) untuk mengundi kerana sememangnya masih berjangkit dan boleh menyebabkan penularan jangkitan kepada orang lain selagi mana masih dalam rawatan. *Saya juga*
H *menegaskan bahawa ujian kendiri yang dibuat oleh mana-mana individu termasuklah Pemohon tidak akan mengubah status dalam MySejahtera mereka kecuali mereka mendapatkan pengesahan daripada pihak Kementerian Kesihatan Malaysia. Tempoh kuarantin atau isolasi sekurang-kurangnya selama 7 hari bagi kes positif Covid-19 adalah dikekalkan ketika itu sepertimana dinyatakan dalam SOP Fasa 4, Pelan Pemulihan Negara (PPN) kemaskini 7.3.2022.*
I (emphasis added)

[16] All three deponents had referred to the SOP for the Johore State Elections. I have no hesitation in holding that the act of excluding the applicant from the polling centre was a decision susceptible to judicial review and that the decision was based on the SOPs which had legislative effect. The standing operating procedures have force of law because they are made pursuant to subsidiary legislation promulgated to curb the outbreak of a dangerous infectious disease under the Prevention and Control of Infectious Diseases Act 1988 ("PACIDA") *ie*, Covid-19.

[17] The applicant was turned away from the polling centre based on the SOP for the Johore State Elections which provided the following procedures or protocol for attendance control at every premise that is used for election purposes (this would include the polling centre) for the duration of the election:

> Kehadiran di setiap premis yang digunakan bagi tujuan pelaksanaan pilihan raya adalah tertakluk kepada Arahan Tetap yang berkuatkuasa yang mana tidak menjejaskan pelaksanaan proses pilihan raya.
>
> Kod QR MySejahtera/Buku Pendaftaran Kehadiran (nama, nombor telefon dan masa) WAJIB disediakan di setiap premis yang digunakan bagi tujuan pilihan raya. *Setiap individu yang hadir ke premis-premis ini hendaklah mengimbas Kod QR MySejahtera serta mengemaskini status kesihatan dalam aplikasi MySejahtera atau mencatat kehadiran di dalam buku yang disediakan (nama, nombor telefon dan masa).*
>
> Menempatkan petugas untuk menyemak status risiko dan gejala bagi setiap individu yang hadir ke premis tersebut. *Hanya individu berstatus "Low risk"' atau "Casual contact" sahaja dibenarkan masuk.*
>
> *Individu positif COVID-19 TIDAK DIBENARKAN hadir ke mana-mana premis yang digunakan untuk aktiviti berkaitan pilihan raya.* (emphasis added)

[18] Dr Mohd Anwar bin Shahrir also referred to the protocol concerning electors who were Covid-19 positive on polling day which said as follows:

> Bagi pengundi yang berstatus COVID-19 positif, mereka adalah TIDAK DIBENARKAN keluar dari tempat mereka sedang menerima rawatan (hospital/pusat rawatan/pusat kuarantin/rumah dll.) untuk mengundi kerana masih dalam rawatan dan sememangnya masih berjangkit dan boleh menyebabkan penularan jangkitan kepada orang lain selagi mana masih dalam rawatan.

[19] It is the Election Commission's case that based on the SOP for the Johore State Elections and the SOP for Phase 4 of the National Recovery Plan electors who are "high risk" or positive Covid-19 by virtue of their MySejahtera status are to be in isolation and cannot leave their quarantine places. The SOP which was updated on 7 March 2022 required persons positive for Covid-19 persons who had been completely vaccinated or received their 'booster dose' to be isolated for seven days whether or not they

have Covid-19 symptoms. Further, the SOP for the Johore State Elections expressly provided that persons positive for Covid-19 were barred from entering any premises used for any activity relating to elections which would include the polling centre.

Analysis And Decision

[20] The applicant by his application is mainly testing the applicability of the SOP for Phase 4 of the National Recovery Plan and the SOP for the Johore State Elections *vis-à-vis* his constitutional right to vote under art. 119(1) of the Federal Constitution, and if he is successful, seeks constitutional compensatory damages for the deprivation of such right in the form of exemplary damages relying on *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579.

[21] For brevity and convenience, a reference in this judgment to an article is a reference to that article in the Federal Constitution.

[22] At the outset, it is important to list out the laws relating to elections before addressing the complaints of the applicant. The Election Commission is established under art. 113(1) and under this provision is bestowed with two functions. The first is to conduct elections to the House of Representatives and the Legislative Assemblies of the States, and the second is to prepare and revise electoral rolls for such elections (see *Abdul Fatah Hj Haron, Saman Gulam v. Tan Sri Hj Mohd Sunoh Marso & Ors* [1987] 2 MLJ 718).

[23] These two functions are elaborated in the Elections Act 1958 and amplified in minute detail in the following regulations made thereunder: (i) Elections (Conduct of Elections) Regulations 1981 ("the 1981 Regulations"); (ii) Elections (Registration of Electors) Regulations 2002; and (iii) Elections (Postal Voting) Regulations 2003. Certain other matters concerning the conduct of elections are provided under the Election Offences Act 1954 which also provides for electoral offences and election petitions.

Whether There Was Unlawful Deprivation Of The Right To Vote

[24] It was submitted that the decision denying the applicant admission to his polling station on the ground that he had contracted an infectious disease and thereby depriving him of his entitlement to vote is unlawful and has contravened art. 119(1). It was argued that an elector is disqualified from voting only in the two instances provided under art. 119(3) and under any law relating to offences committed in connection with elections. It was further argued that the applicant was not so disqualified as stipulated and that there was nothing whatsoever in the election laws that deprived an elector to vote on the basis that such elector was infected with an infectious disease. It was also argued that the sole power to hold elections was conferred on the Election Commission and that the SOP for the Johore State Elections has no

legal effect insofar as it pertains to the conduct of elections. In this regard, it was argued that the Election Commission had acted *ultra vires* and/or irrationally by relying on the said SOP by putting it above art. 119(3).

[25] I am unable to agree with this submission. Under art. 119(1) it is clear that an elector who fulfils the requirements of age and residency and who is registered as an elector in the electoral roll of the constituency in which he resides is entitled to vote in any election unless he is disqualified under art. 119(3) or under any law relating to offences committed in connection with elections. But more importantly, it cannot be overlooked that the Election Commission is also subject to federal law when conducting elections by virtue of art. 113(1). In my judgment one such Federal law is the PACIDA. The PACIDA has a provision that confers power to the Minister to make regulations to curb the outbreak of infectious diseases among humans that is threatening public health.

[26] Covid-19 began as a pandemic and an incontrovertible threat to humans causing fatalities in the thousands in Malaysia and millions throughout the world. Countries affected by Covid-19 also closed their borders and took similar action as was taken in Malaysia to control of movement of its citizens. The regulations made by the Minister empower the Director-General of Health to make standing operating procedures to regulate daily and specific activities, in minute detail, which control of movement of the public including serious measures as lockdowns and isolation of infected persons. Such standing operating procedures bind the public, in particular the persons concerned in a specific activity which in my mind would obviously include the Election Commission when conducting elections as activities relating to elections involve the participation of the public in huge numbers.

[27] My reasons for being unable to agree with the submission is as follows. I begin with art. 119 which provides:

> (1) Every citizen who:
>
> (a) has attained the age of eighteen years on the qualifying date;
>
> (b) is resident in a constituency on such qualifying date or, if not so resident, is an absent voter; and
>
> (c) is, under the provisions of any law relating to elections, registered in the electoral roll as an elector in the constituency in which he resides on the qualifying date,
>
> is entitled to vote in that constituency in any election to the House of Representatives or the Legislative Assembly unless he is disqualified under Clause (3) or under any law relating to offences committed in connection with elections; but no person shall in the same election vote in more than one constituency.

A (2) If a person is in a constituency by reason only of being a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or of being detained in custody he shall for the purposes of Clause (1) be deemed not to be resident in that constituency.

B (3) A person is disqualified for being an elector in any election to the House of Representatives or the Legislative Assembly if:

(a) on the qualifying date he is detained as a person of unsound mind or is serving a sentence of imprisonment; or

C (b) having before the qualifying date been convicted in any part of the Commonwealth of an offence and sentenced to death or imprisonment for a term exceeding twelve months, he remains liable on the qualifying date to suffer any punishment for that offence.

D (4) In this Article:

(a) "absent voter" means, in relation to any constituency, any citizen who is registered as an absent voter in respect of that constituency;

(b) "qualifying date" means the date on which a person is
E registered as an elector in a constituency, or the date on which he applies for the change of his registration as an elector in a different constituency, in accordance with the provisions of any law relating to elections.

[28] Article 119 provides for three main matters. First, the qualifications
F to be an elector and the instances an elector is disqualified from being registered as an elector *ie*, when he applies for the first time to be an elector or when an elector who is already registered as an elector applies for the change of his registration as an elector in a different constituency. Second, where a citizen is successfully registered as an elector on the electoral roll
G of the constituency in which he resides in that person is entitled to vote in any elections held in respect of the constituency. Thirdly, an elector would be disqualified from voting in any election notwithstanding he is a registered elector if he is:

(i) detained as a person of unsound mind;

H (ii) is serving a sentence of imprisonment;

(iii) sentenced to death or imprisoned for a term exceeding 12 months in any part of the Commonwealth; and

(iv) is disqualified under any law relating to offences committed in
I connection with elections.

[29] As shown above, it was submitted that outside the four said situations the entitlement to vote is untrammelled. In my view, the submission is result of a very restrictive and isolated interpretation of art. 119(1) without considering the other articles concerning the conduct of elections. It is an established and frequently applied principle of constitutional construction that no provision of the constitution should be considered in isolation. The particular provision under scrutiny must be brought into view with all the other provisions bearing on the same subject so that the true interpretation can be made (see *Zi Publications Sdn Bhd v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener)* [2015] 8 CLJ 621 and *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701).

[30] The connected article that throws light on the conduct of elections is art. 113(1) which provide as follows:

> There shall be an Election Commission, to be constituted in accordance with Article 114, which, **subject to the provisions of federal law, shall conduct elections to the House of Representatives and the Legislative Assemblies of the States** and prepare and revise electoral rolls for such elections. (emphasis added)

[31] The words "subject to the provisions of federal law" in art. 113(1) are words indicating restriction. The words warn that there would be in a Federal law somewhere a limitation upon the authority to conduct elections. The words "Federal law" in art. 160(2), amongst others, mean an Act of Parliament. Thus, there could be an Act of Parliament which would impose restrictions or limitations on the Election Commission in their function of conducting elections.

[32] The entitlement to vote is therefore not untrammelled. The "Federal law" in art. 113(1) would first and foremost include election laws such as the Elections Act 1958 and the regulations made thereunder which have restrictions on the entitlement to vote. Take for instance the 1981 Regulations, made under the Elections Act 1958, which contain provisions that impose restrictions on the entitlement to vote. It suffices to refer to a couple of these provisions. Regulation 15(6)(b) restrict admittance into his polling station an elector who either misconducts himself or fails to obey a lawful order given by the presiding officer of the polling station and reg. 23 deprives an elector from voting in cases where the elector arrives at the polling station after the hour fixed for the closing for poll.

[33] Secondly, the words "Federal law" would also include laws other than laws relating to elections. The Federal law in question here is the PACIDA. Before proceeding, it is pertinent to briefly put again into context the infectious disease known as Covid-19 in relation to the PACIDA. This court can take judicial notice of the fact that the world was faced with a pandemic

caused by a virus which until then was unknown and highly infectious causing fatalities through transmission amongst humans. There was no precedent to assist in controlling or preventing the spread of the virus. In Malaysia, laws were promulgated and restrictions were put in place from time to time ranging from initially total lockdowns to various degrees of restriction on movements imposed on the public under the PACIDA and the regulations made thereunder including the various SOPs issued from time to time on all daily and specific activities of the public. As alluded to above, one of the many specific activities for which the SOPs were promulgated was the Johore State Elections. At this point, in time the SOP for Phase 4 of the National Recovery Plan updated on 7 March 2022 was also in force.

[34] Now, PACIDA is a public health legislation enacted to prevent and control infectious diseases whether the infectious disease is within or outside Malaysia. In situations where there is an outbreak of an infectious disease in the country, s. 11 of the PACIDA is triggered as was done in this case giving it authority over all persons in the country and coercive powers in cases of non-compliance. The section read as follows:

(i) if the minister is satisfied that there is an outbreak of an infectious disease in any area in Malaysia, or that any area is threatened with an epidemic of any infectious disease, he may, by order in the *Gazette*, declare such area to be an infected local area;

(ii) the minister may, by regulations made under this Act, prescribe the measures to be taken to control or prevent the spread of any infectious disease within or from an infected local area;

(iii) during the continuance in force of an order made under sub-s. (1), it shall be lawful for any authorised officer to direct any person or class or category of persons living in an infected local area or in any part thereof to subject himself or themselves:

(a) to treatment or immunisation;

(b) to isolation, observation or surveillance, the period of which being specified according to circumstances; or

(c) to any other measures as the authorised officer considers necessary to control the disease.

(iv) it shall be lawful for an authorised officer to use such force, with or without assistance, as may be necessary and to employ such methods as may be sufficient to ensure compliance with any direction issued under sub-s. (3); and

(v) any person who refuses to comply with any direction issued under sub-s. (3) commits an offence.

[35] The Minister in the exercise of his powers under sub-s. 11(1) of PACIDA made the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020 *vide* PU(A) 87/2020 with effect from 18 March 2020 after being satisfied that all the States and Federal Territories in Malaysia were under the threat with an epidemic of an infectious disease known as Covid-19, which is a life threatening microbial infection as specified in Part I of the First Schedule to the Act, and declared all the States and the Federal Territories to be infected local areas. The operation of this order was extended from time to time and was in force during the Johore State Elections. The said order was in operation from 1 January 2022 until 30 June 2022 by virtue of the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) (No. 3) Order 2021 *vide* PU(A) 472/2021.

[36] Having declared all the states in the country as an infected local area the Minister promulgated the Prevention And Control Of Infectious Diseases (Measures Within Infected Local Areas) (National Recovery Plan) Regulations 2021 (PU(A) 293/2021) ("the 2021 Regulations"). Regulation 5 of the 2021 Regulations restricted the freedom of movement of all persons within any infected local area during the course of a designated phase in the following words:

> (1) No person shall, during *any designated phase, move from one place to another place within any infected local area, ...*
>
> (2) *Notwithstanding sub regulation (1), the Director General may issue any directions and conditions for the purposes of movement of any person, during any designated phase, from one place to another place within any infected local area, ...*
>
> (3) Any directions and conditions issued by the Director General under sub regulation (2) shall be published in the website of the National Security Council. (emphasis added)

[37] The phrase "designated phase" in reg. 5(1) of the 2021 Regulations is defined in the said regulations as any phase in the National Recovery Plan determined and announced by the Government from time to time and published on the website of the National Security Council. The Johore State Elections fell within the scope of the SOP for Phase 4 of the National Recovery Plan.

[38] The SOP for Phase 4 of the National Recovery Plan and the SOP for the Johore State Elections were made by the Director-General of Health pursuant to regulation 16 of the 2021 Regulations which state:

> (i) the Director General may, during any designated phase, issue any directions and conditions in any manner, whether generally or specifically, to any person or group of persons to take such measures for the purpose of preventing and controlling any infectious diseases within any infected local area; and

A (ii) any directions and conditions issued by the Director General under sub-reg. (1) shall be published on the website of the National Security Council.

[39] The 2021 Regulations and the SOPs made thereunder would bind the public generally while the SOP for the Johore State Elections would B specifically bind the Election Commission in its function of conducting elections. The period the SOP is in force is for the entire duration of the election process. On polling day, there would be mass movement and close gathering of the electors at the various polling centres and polling stations. The legislation was promulgated for the public health and imposed C restrictions and limitations to prevent and control the transmission of the virus amongst electors, election officers and other officers who are on duty. The SOP for Phase 4 of the National Recovery Plan was very clear in restricting persons positive with Covid-19 to be in isolation or quarantine for seven days while the SOP for the Johore State Elections denied entry of such D persons to any place for the purposes of carrying out the election process which would include polling centres.

[40] In view of the above backdrop, in particular art. 113(1) which expressly provides that the Election Commission's function to carry out elections would be subject to "Federal law" which in the instant case is the E PACIDA, a law enacted to prevent and control infectious diseases for public health. The election was therefore subjected to the restrictions and limitations imposed under such federal law. I have no hesitation in holding that the Election Commission had not acted illegally and/or irrationally by complying with and giving effect to the SOP for the Johore State Elections F by restricting admittance into the polling centre electors positive for Covid-19. The Election Commission was bound by art. 113(1) to give effect to such federal law when carrying out its function of conducting elections.

Persons Positive For Covid-19 Not Restricted From Voting

G **[41]** The applicant's alternative submission was that, even if, the Election Commission was correct in relying on the SOP, the SOP itself does not prevent the applicant from voting. It was argued that all that the SOP does is prohibit voters who are Covid-19 positive, PUS and PUI from leaving their quarantine place to go to the polling centre without approval from the District Health Officer. But given that the applicant was already at his polling H centre (obviously by violating the SOP), there is nothing in the SOP to stop him from voting. It was argued that it is not the business of the Election Commission to enforce the breach of the SOP as that function is that of the Director-General of Health. It was also argued that the SOP provides that electors positive for Covid-19 are allowed to vote by virtue of this protocol I which provides for disinfection in the following words:

Khemah/bilik/ruang khas hendaklah dilakukan disinfeksi berdasarkan garis panduan KKM sebaik sahaja selepas setiap pengundi positif COVID-19, PUI dan PUS selesai mengundi.

[42] At first blush, it would appear that electors positive for Covid-19 were entitled to vote together with electors who were PUS or PUI. However, having considered the entire SOP carefully, I found that the SOP prevented electors positive for Covid-19 from entering any premises used for the conduct of elections. In my view, by merely looking at one paragraph in isolation of the other paragraphs does not convey the true meaning of the SOP. In considering all the relevant paragraphs in totality, I found as follows. The first part of the SOP concerns the control of attendance or "kawalan kehadiran" at all premises used for election purposes. The SOP state as follows (numbering inserted for convenience):

(i) Kehadiran di setiap premis yang digunakan bagi tujuan pelaksanaan pilihan raya adalah tertakluk kepada Arahan Tetap yang berkuatkuasa yang mana tidak menjejaskan pelaksanaan proses pilihan raya.

(ii) Kod QR MySejahtera/Buku Pendaftaran Kehadiran (nama, nombor telefon dan masa) WAJIB disediakan di setiap premis yang digunakan bagi tujuan pilihan raya. Setiap individu yang hadir ke premis-premis ini hendaklah mengimbas Kod QR MySejahtera serta mengemaskini status kesihatan dalam aplikasi MySejahtera atau mencatat kehadiran di dalam buku yang disediakan (nama, nombor telefon dan masa).

(iii) *Menempatkan petugas untuk menyemak status risiko dan gejala bagi setiap individu yang hadir ke premis tersebut. Hanya individu berstatus "Low risk" atau "Casual contact" sahaja dibenarkan masuk.*

(iv) *Individu positif C0VID-19 TIDAK DIBENARKAN hadir ke mana-mana premis yang digunakan untuk aktiviti berkaitan pilihan raya.*

(emphasis added)

[43] It is clear that any persons positive for Covid-19 are prevented from admittance to any premises used for any activity concerning the elections. Then there is a whole section of the SOP assigned to deal with electors having symptoms of Covid-19 which is not necessary to reproduce here. Finally, there are the procedure and protocol concerning electors who are positive for Covid-19 and electors who are either PUS or PUI on polling day stated as follows (numbering inserted for convenience):

(i) *Bagi pengundi yang berstatus COVID-19 positif, mereka adalah TIDAK DIBENARKAN keluar dari* tempat mereka sedang menerima rawatan (hospital/pusat rawatan/pusat kuarantin/rumah dll.) untuk mengundi kerana masih dalam rawatan *dan sememangnya masih berjangkit dan boleh menyebabkan penularan jangkitan kepada orang lain selagi mana masih dalam rawatan.*

(ii) *Pengundi berstatus patient under investigation (PUI) dan person under surveillance (PUS) yang ingin mengundi HENDAKLAH MEMOHON KEBENARAN dari Pegawai Kesihatan Daerah (PKD), Pejabat Kesihatan Daerah yang mengawasi Arahan Perintah Pengawasan dan Pemerhatian berkenaan, untuk keluar sementara ke Pusat Mengundi.* Kebenaran ini adalah tertakluk kepada penilaian risiko jangkitan oleh Pegawai Kesihatan Daerah tersebut dan pengundi perlu mematuhi semua garis panduan yang ditetapkan oleh KKM.

(iii) Pengundi yang berstatus PUI dan PUS hendaklah diasing dan DITEMPATKAN DI KHEMAH/BILIK/RUANG KHAS yang disediakan.

(iv) *PUI dan PUS DIKEHENDAKI menggunakan pengangkutan sendiri untuk pergi ke Pusat Mengundi. Penggunaan pengangkutan awam TIDAK DIBENARKAN.*

(v) Kebenaran keluar mengundi untuk individu yang berstatus PUI dan PUS adalah tertakluk kepada tempoh yang dibenarkan oleh pihak KKM. *Setelah selesai mengundi, individu ini dikehendaki segera meninggalkan Pusat Mengundi dan terus pulang ke tempat kuarantin dijalankan.*

(vi) Khemah/bilik/ruang khas hendaklah dilakukan disinfeksi berdasarkan garis panduan KKM sebaik sahaja selepas setiap pengundi positif COVID-19, PUI dan PUS selesai mengundi.

(emphasis added)

[44] The SOP states that persons positive for Covid-19 are barred from leaving the place of their quarantine. The applicant is not "low risk" or "casual contact", "PUS" or "PUI". He is positive for Covid-19 on polling day although he claims that his self-test was negative. This court is not in a position to determine whether the SOP for Phase 4 of the National Recovery Plan which requires seven days isolation is irrational or not because issues of public health are for the Executive to decide. It is wholly inappropriate for this court to attempt any substitution of views. In matters of public health, especially concerning and until then an unknown infectious disease this court declines in the exercise of its discretionary power to enter into the merits of such a decision.

[45] For all the above reasons, I hold that there was no illegality or irrationality for the Election Commission to comply with the said SOP. The Election Commission did not commit any error of law or misconstrue the SOP for the Johore State Elections. The Election Commission was under art. 113(1) subject to any Federal law which concerns public health in carrying out its function of conducting elections. The SOP which is made under the PACIDA has legislative effect and was lawfully followed by the Election Commission.

Damages

[46] The applicant submitted that he is entitled to constitutional monetary compensation from the Election Commission for depriving him of his constitutional right to vote provided in art. 119(1). He relies on the principle propounded in the minority judgments of the Federal Court in *Maria Chin Abdullah*. In the circumstances, the principle was not binding on this court. However, since the matter was extensively ventilated, it is my decision that the claim for constitutional monetary compensation expounded in the minority judgments have no application in respect of a deprivation of the entitlement to vote under art. 119(1). My reasons are as follows.

[47] The minority judgments explained that although the claim for constitutional monetary compensation is not expressly stated in the Federal Constitution, it is nevertheless grounded on the breach of the fundamental rights chapter of the Federal Constitution itself in the following words:

> [600] The point to be made is this. Where a breach of a fundamental right is alleged, a cause of action lies. The right itself is grounded on the FC and it does not strictly matter whether the breach could also be made out under private law remedies. The rule is stated with caution as it is not absolute and it depends on the circumstances of the case. ...
>
> [601] ... to what extent 'constitutional monetary compensation' is available depends on the facts and circumstances of each case and that the remedy should only be afforded with great judicial restraint. ... such awards, that is, of constitutional monetary compensation, should only be made 'in appropriate cases where that is the only mode of redress available.' ... that constitutional monetary compensation is essentially exemplary damages (though again, not damages in the sense of O. 53 r. 5 of the ROC 2012). ...

[48] In *Maria Chin Abdullah,* the fundamental right that was violated was the right of personal liberty under art. 5(1) read with art. 8(1). The minority judgments were of the view that the declarations granted to the effect that the decision to blacklist Maria Chin Abdullah from travelling overseas in the circumstances was a breach of the said articles and therefore unconstitutional and void. The minority judgments, after considering the facts of the case held that the circumstances do not justify the grant of constitutional monetary compensation and the declarations already granted meet the ends of justice. Thus, a monetary compensation is not always necessary as a declaration that there was a breach of fundamental right would in appropriate circumstances vindicate the fundamental right of a person.

[49] It is clear that the case of *Maria Chin Abdullah* concerned a fundamental right enshrined in the fundamental liberties chapter housed in Part II of the Federal Constitution. This chapter contains the fundamental inalienable freedoms or basic human freedoms. The right to vote is not part

of this fundamental liberties chapter. This is not so strange, although the right to vote is a cornerstone of democracy, given that the right to vote is a statutory right and not a civil right or common law right. The position was stated by the Federal Court in *Yazid Sufaat v. Suruhanjaya Pilihanraya Malaysia* [2010] 3 CLJ 903 following the Supreme Court of India decision in *Anukul Chandra Pradhan v. Union of India* AIR [1997] SC 2814 which said:

> It may also be mentioned that the nature of right to vote has been held to be a statutory right and not a common law right because of which it depends on the nature of right conferred by the statute. In *N. P. Ponnuswami v. Returning Officer, Namakkal Constituency* [1952] SCR 218 at 236, the Constitution Bench held:
>
> > The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.
>
> In *Jyoti Basu v. Debi Ghosal* [1982] 1 SCC 691 at 696: (AIR 1982 SC 983 at p. 986), the law on the point was restated, thus:
>
> > The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by the Court in *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency* [1952] SCR 218: (AIR 1952 SC 64) and *Jagan Nath v. Jaswant Singh* [1954] SCR 892: (AIR 1954 SC 210). We proceed to state what we have gleaned from what has been said, so much as necessary for this case.
>
> A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to dispute an election. Outside of statute, there is no right to elect, creations they are, and therefore, subject to statutory limitation.
>
> In view of the settled law on the point, it must be held that the right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute; and that the challenge to any provision in the statute prescribing the nature of right to elect cannot be made with reference to a fundamental right in the Constitution. The very basis of challenge to the validity of sub-sec. (5) of s. 62 of the Act is, therefore, not available and this petition must fail.

[50] Secondly, the remedy provided for breach of any provision relating to conduct of elections is by way of an election petition as provided by art. 118. The remedy is elaborated in the Election Offences Act 1954. The denial of a right to vote is a breach of the right of a person registered on the electoral roll. The right is to elect a representative who is standing for elections together with thousands of other electors. The right to vote is therefore not part of the jurisdiction that deals with the rights and obligations of individuals

as in the ordinary civil jurisdiction of the court because such jurisdiction is unknown to the courts. The right to vote is part of the process which includes the right to stand for elections as a candidate and the right to question the result of the election. The right to vote does not exist in vacuum. It is part of a special jurisdiction that deals with matters affecting on the one hand the integrity of the country's Legislature and on the other hand the representation in that Legislature of constituencies comprising many thousands of electors. This jurisdiction provides only one remedy which is an election petition.

Conclusion

[51] For the reasons stated above I dismissed the application for judicial review.